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In The

Supreme Court of the United States

October Term, 1996

PAULINE BRINE, ELIZABETH PELTON and NANCY THOMPSON,

Petitioners,

vs.

THE IOWA BOARD OF REGENTS AND THE UNIVERSITY OF IOWA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the court of appeals correctly concluded, viewing the record evidence in the light most favorable to Petitioners, that the evidence at trial failed to demonstrate an "adverse employment action."

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BRIEF IN OPPOSITION

The Respondents the Iowa Board of Regents and the University of Iowa, respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on July 19, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is included as an appendix to the petition and has been published as *Brine v. University of Iowa*, 90 F.3d 271 (8th Cir. 1996).

In addition, the trial court's Opinion and Judgment filed May 5, 1995, is also included as an appendix to the petition. The trial court's Order ruling on post-trial motions dated June 15, 1996 is included in the appendix to this Brief in Opposition.

STATEMENT OF THE CASE

This case arose from an April 1992 decision by the State Board of Regents ("Regents") to close the department of dental hygiene and phase out the dental hygiene training program at the University of Iowa ("University"), one of five state educational institutions under Regents' control.

That decision was the culmination of a lengthy strategic planning process and a spring 1991 Regents' directive

to the University to study some 30 programs for possible reduction or enhancement. The possible closing of the dental hygiene program within the College of Dentistry was the subject of internal correspondence between the Dean of Dentistry and the University President in June 1991. The dean's recommendation and plan for closing were formally presented to the University administration in September 1991, and shortly thereafter included in a public list of programs to be studied.

An ad hoc college committee comprised of seven College of Dentistry faculty (four of whom had been trained as dental hygienists) and four senior faculty from outside the College studied the closing recommendation during the fall of 1991, collecting numerous documents and hearing testimony from a variety of viewpoints, including those of the dental hygiene faculty and other dental hygienists.

In early November 1991 the ad hoc committee unanimously recommended closing the department effective June 30, 1992. It found that the dental hygiene program was not central to the missions of the University and the College. A decline in enrollment from 80 to 36 students over the prior decade also supported the recommendation, as did the fact that similar trends had caused other similar universities to close their programs. The committee's report also recommended that students currently enrolled be permitted to complete the program and, importantly, the tenured faculty including plaintiffs be assigned to other faculty positions in the University.

The plaintiffs spoke against the proposed closing on educational grounds before the ad hoc committee and

issued a written response to the ad hoc committee report in late November 1992. It was in this response that plaintiffs raised for the first time the allegation of gender discrimination.

In December 1992, plaintiffs objected to the University's closing recommendation at a Regents' meeting and the Regents responded by creating a review committee external to the University, to study the proposal further. After a majority of this external review committee supported the decision to close the department, the Regents voted (6 to 3) to close it effective June 30, 1992.

In May 1992, plaintiffs filed complaints with the EEOC alleging that closing a department whose faculty and students were all women constituted sex discrimination. In addition, they alleged that plaintiffs had been retaliated against by excluding them from the development of alternative dental hygiene programs.

In April 1993, plaintiffs filed their initial complaint in federal court. Plaintiffs again pleaded retaliation as one of many legal theories, adding as an additional adverse employment action that they had been excluded from planning the program's phase out.

In January 1995, plaintiffs filed a Third Amended Complaint, which added the allegation that plaintiffs had been retaliated against by receiving "lower salary increases since 1992." This amendment came after defendants had moved for summary judgment on all Title VII claims on the grounds that plaintiffs had failed to create a triable issue that they had experienced any adverse employment action.

Accordingly, as of the trial in April 1995, and as reflected in plaintiffs' trial brief and proposed instructions, the specific adverse employment actions claimed by plaintiffs occurred after the Regents' decision in April 1992 and included, in addition to the actual decision to close the program, the defendants' decision "to demote Brine, bar plaintiffs from phase out planning, and to give lower than average salary increases to all plaintiffs."

As of 1995, the phase out of the department was nearly complete. The plaintiffs continued at all times to be tenured associate professors in the University. They never missed a paycheck. They received significant raises each year since the closing of the department in 1992. The terms and conditions of their employment were essentially unchanged, except that their administrative unit no longer existed. After some negotiations in summer 1992, Brine agreed to assume the title "program coordinator," with no loss of pay, benefits, change of office location, or any other tangible disadvantage. She continued to function in all respects as the academic leader of the program. The only new circumstances identified by Plaintiff Brine accompanying her change of title was that the head of preventive and community dentistry was now required to sign requisitions and she was no longer required to attend deans' meetings with all departmental executive officers ("DEOs").

Little attention at trial was given to the issue of retaliation in general, or to the specific allegations of adverse employment actions. Rather, plaintiffs spent many days attempting to produce evidence that the procedure employed by the University to consider closing

the program was flawed and that the decision was wrong on academic grounds.

There was little or no disagreement between the parties at trial on the elements of plaintiffs' disparate treatment or retaliation claims, or the application of the *McDonnell-Douglas* framework.

The University's position at trial with respect to both the disparate treatment and retaliation claims was that plaintiffs had not proved the common element of "adverse employment action." The element of "protected activity" was not in dispute because all of plaintiffs' then allegations related to events occurring after the filing of their EEOC complaint. Nor was causation a fighting issue at the trial.

With respect to salary increases, the University argued that the allegation they had been given lower than salary increases was fatally flawed both because plaintiffs had offered no evidence supporting an entitlement to an average raise (the University has a merit-based system of salary raises) and that the plaintiffs had provided no credible evidence that they had in fact received lower than average raises. The University argued that the "demotion" of Brine was no more than a change of title required by its reasonable decision to merge the hygiene department as an administrative unit into the Department of Preventive and Community Dentistry during the phase out period and that there were no materially adverse consequences to Brine from that change in title.[1]

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[1] Contrary to the suggestion at page 3 of the Petition, plaintiffs at all times had secretarial support comparable to that of their dental college colleagues.

Both with respect to its decision to close the department during phase out and its approach to phase out planning, the University properly noted that these were educational or administrative decisions and not in and of themselves employment decisions at all.[2]

The trial court submitted plaintiffs' retaliation claim to the jury with a definition of "adverse employment action" drawn from prior Eighth Circuit and Seventh Circuit decisions, without directing the jury to disregard any of plaintiffs' alleged adverse employment actions except the claim that the closing itself was such an action.

The jury returned a verdict for the University on plaintiffs' disparate treatment claim, rejecting the notion that there was discrimination in the decision to close the program or the process leading to it.

The jury returned for the plaintiffs on their retaliation claim, awarding them lost wages in the amounts they claimed their raises were deficient and $65,000 each in emotional distress damages. Implicit in that verdict was the jury's acceptance of plaintiffs' "lower than average" salary raise theory. In addition, the jury must have accepted some other notion of adverse employment action because they purported to find that approximately 10% of the plaintiffs' damage had occurred prior to November 21, 1991, the effective date of the 1991 Civil

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[2] Undisputed evidence in the record confirms that plaintiffs participated in discussions with the provost and dean concerning the phase out. Nothing in Title VII requires university administration to accept all of plaintiffs' preferences, although the plans were in fact modified in response to their expressed concerns.

Rights Act. From that point forward, considerable confusion ensued as to what plaintiffs were claiming as adverse employment actions and a causation issue entered the case. There simply had been no evidence of "protected activity" prior to November 21, 1991.

In a ruling dated June 15, 1995 (included in Respondents' Appendix to this Brief in Opposition), the trial court granted in part the University's motion for judgment as a matter of law on the retaliation claims and denied it in part. The grant related to the "lower than average salary increases:"

> The jury cannot have reasonably relied on plaintiffs' evidence to conclude that plaintiffs' salary increases were lower than "average," as there was no credible evidence presented which actually proved the "average" to which they compared themselves, or that there was an automatic entitlement to an "average" increase.

(Resp. App. 11-12.)

However, after holding that it was not an adverse employment decision to eliminate the duties of the DEO in light of the decision to eliminate the department, the trial court went on to hold that "the timing of such a decision may be an adverse employment decision." (Resp. App. 9.) Then, in a section entitled "Phase out Activities," the trial court held that limitations on plaintiffs' "active participation" in the ad hoc committee and other review processes could constitute an adverse employment action. (Resp. App. 9.) This further confused the issue, both because the term "phase out" had been used at trial exclusively in reference to post-closing

events (after June 30, 1992) and because the ad hoc committee process occurred before there was any "protected activity."

The University appealed to the Eighth Circuit the entry of judgment against it on plaintiffs' retaliation claim. The University's sole argument in that regard was that plaintiffs did not establish the element of an adverse employment action required by their Title VII retaliation claim. The University developed the arguments that it made to the trial court with respect to the "demotion" of Plaintiff Brine and the supposed inadequate participation in phase out activities. With respect to the supposed inadequacy of plaintiffs' participation in the review process, the University again pointed out that these decisions were not employment decisions at all and had occurred prior to any record evidence of protected activity. The University drew analogies to Eighth Circuit decisions in *Harlston v. McDonnell-Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994), *Bradford v. Norfolk Southern Corp.*, 54 F.3d 1412 (8th Cir. 1995), and *Evans v. Kansas City, Missouri School District*, 65 F.3d 98 (8th Cir. 1995), and Seventh Circuit decisions in *Crady v. Liberty National Bank and Trust Co.*, 993 F.2d 132 (7th Cir. 1993), and *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989).

In responding to the University's arguments before the circuit, plaintiffs in no way suggested that the Seventh and Eighth Circuits were somehow out of step with the rest of the country or otherwise found fault with their analytical approach. Indeed, plaintiffs cited *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir. 1994) with approval. Rather, plaintiffs' approach was an effort to bring themselves within accepted circuit doctrine and precedents.

In addressing the University's challenge to the judgment against it, the Eighth Circuit stated:

> The University appeals, arguing that, as a matter of law, it took no "adverse employment action" that could be considered retaliation for allegations of sex discrimination. We agree.

(App. 3.)

Later, the circuit court went on to recite each of the alleged adverse employment actions and address them individually. (App. 4-6.) Dealing first with *the alleged exclusion from review committees and phase out planning*, the court noted that:

> The plaintiffs have directed us to nothing that establishes their right to be so included. They point to no law, custom or practice that gives them such a right. We note, moreover, that each plaintiff testified before at least one of the review committees. Finally, we saw no evidence other than timing tending to establish that the challenged exclusions of the plaintiffs were because of their allegations of sex discrimination. Timing alone is not enough *in the circumstances of this case*. [Emphasis added.]

The Court of Appeals went on to affirm the trial court's holding that the closing of the department as an administrative unit could not be considered an adverse employment action and that the change in title and other procedures was simply an inevitable consequence of the decision to close the department. (App. 6.)

REASONS FOR DENYING THE WRIT

I. The "Question Presented" By Petitioners Is Not Presented.

Petitioners state that the question presented is whether the court of appeals applied the proper standards for assessing a prima facie case of retaliation under Title VII. For several reasons, the University suggests that is not the issue here.

First, there was no dispute below about the elements of a retaliation claim. The court below set out a widely accepted statement of what a plaintiff must prove in order to prevail (App. 4), and Petitioners did not take exception to that statement below or here. Both below and here Petitioners' real claim is merely that a properly stated rule of law has been misapplied. As Supreme Court Rule 10 expressly states, such a claim is rarely a basis for granting a petition.

Second, as a procedural matter, the trial court held, both in denying the University's motion for summary judgment and its motion for judgment as a matter of law at the close of plaintiffs' case, that plaintiffs had satisfied their burden of making a prima facie case. Both the courts below and this court now can consider the retaliation claim in light of all the record evidence. *United States Postal Service v. Aikens*, 460 U.S. 711, 715-16, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

Finally, it may be helpful to note that the retaliation claim in this case did not involve the typical fight over intent or motivation. Rather, the University argued that it had engaged in no predicate act (or inaction) sufficient

for a Title VII claim. It is the intent or motivation element in discrimination cases, i.e., the difficulties of both proof and disproof, that prompted this Court to adopt the *McDonnell-Douglas* burden-shifting framework. There are no comparable difficulties in identifying, describing, and proving the employer's conduct which require the use of presumptions. Nothing in the decision below is inconsistent with the Court's prior pronouncements.

II. This Case Presents No Important Federal Question Concerning The Application Of The Causation Element Of A Retaliation Claim.

Petitioners object to the statement in the opinion below that "timing alone is not enough in the circumstances of this case." (App. 5.) In context and on its face, this statement cannot be understood as announcing a new rule of law, much less one that conflicts with the holdings of other circuits.[3]

As set out above, the context of the criticized language relates solely to Petitioners' claim that the University's review and phase out planning processes afforded insufficient participation opportunities to the dental hygiene faculty.

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[3] If there is a conflict in the circuits concerning whether to apply a "but for" or a "substantial factor" test in addressing the causation element of a retaliation claim, it is not relevant here because the courts below were never asked to address the issue and because it would make no difference to the outcome here which test were applied.

The University has consistently contended that such claims cannot be adverse *employment* actions because they involve broad issues of academic and administrative judgment that have no obvious connection to any particular person's employment. Petitioners' view is that any decision, even if unrelated to anyone's job, can be characterized as retaliatory if it is taken reasonably proximate in time to protected activity. The court below was merely saying that, in a circumstance where the decision is not job-related, timing alone is not enough to transform that decision into an adverse *employment* action.

III. The Court Below Did Not Limit Retaliation Claims To Employment Actions Which Infringe Upon Employees' Rights.

Petitioner makes a sweeping interpretation of language in the opinion below which is in fact quite narrow and appropriate in the context in which it is used.

Referring again to Petitioners' complaint of insufficient participation in the review and phase out planning processes, the court noted that they pointed to no law, custom or practice that gave them a right to more extensive participation in these processes.

Most retaliation claims involve allegations of specific, tangible and affirmative actions directly detrimental to an employee, such as termination. A few claims have involved allegations of failure to act or withholding of benefits afforded others. The claims here relating to participation in review and planning processes are of this latter type. As is generally the case in tort law, one can impose liability for failure to act only by showing a duty

to act. Similarly, said the court below, if one claims retaliation based on not receiving a requested benefit, it is necessary to show that one is entitled to receive the benefit or, at the least, that other persons similarly situated have received the requested benefit or treatment. Petitioners could not make such a showing here; as a matter of law this allegation could not constitute an adverse employment action. Rather than generating a major change in the law, the court below was carefully and narrowly applying established doctrine to specific facts.

IV. The Holding That Petitioners Have Failed To Prove An Adverse Employment Action Is Not In Conflict With Decisions In Other Circuits.

Petitioners suggest that unless certiorari is granted here, some retaliation plaintiffs will be dismissed as a matter of law while others prevail on nearly identical fact patterns. It is easy to make that assertion. It would not be particularly difficult to document it by reference to specific cases if it were true.

Here, it is not true. Petitioners point to no decisions, and Respondents know of none, in which on remotely analogous facts a court has held that a plaintiff has established an adverse employment action.

Rather, Petitioners' discussion focuses only on the language employed by the court to articulate its reasoning and then in a manner that is abstract, academic and frequently out of context. Respondent respectfully suggests this Court should decline the invitation to sit as an editorial board for the *Federal Reporter*.

Thus, Judge Posner's referenced musing that there is "some tension" in the cases relating to how severe and how job-related an "adverse employment action" must be to sustain a retaliation claim may well be insightful. However, he determined in *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996) that he need not sort out the tangle in the case before him because those potential issues were not involved. So here Respondent respectfully suggests that this Court may wish to await a case in which that "tension" is actually present or where the decision below actually conflicts with the decision of another circuit to determine whether relief from the tension is required.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PAULINE BRINE, ELIZABETH PELTON and NANCY THOMPSON,	)	
Plaintiff,	)	No. 4-94-CV-20688
vs.	)	ORDER
THE IOWA BOARD OF REGENTS AND THE UNIVERSITY OF IOWA,	)	(Filed Jun. 15, 1995)
Defendants.	)	

Trial in this matter was held April 10-25, 1995. Both parties have filed post-trial motions. Defendants have moved for Judgment as a Matter of Law, and have also moved for a New Trial on the claim of retaliation. Plaintiffs seek Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial. They also request equitable and compensatory relief pursuant to their claims.

Oral argument on these matters was held June 1, 1995. On June 15, 1995 Plaintiffs filed a Supplemental Memorandum in Support of Plaintiffs' Motion for Equitable and Compensatory Relief. These motions are now fully submitted and ready for ruling.

I. BACKGROUND

Plaintiffs are three of the four female tenured faculty members of the University of Iowa College of Dentistry's

Dental Hygiene Department. The University's Department of Dental Hygiene began in 1953. All faculty and students of the department, including all former faculty and graduates, have been women. On November 11, 1991, after an internal review, the University of Iowa (University) recommended to the Iowa Board of Regents (Regents) that the Department of Dental Hygiene be closed. After numerous meetings, reviews, and hearings, in April 1992 the Regents voted six to three to close the Department of Dental Hygiene effective June 30, 1992.

Plaintiffs filed their civil rights charges in May 1992, contending that the decision to close the Department of Dental Hygiene caused a disparate impact on women in general, and disparate treatment to the Plaintiffs. After filing these charges, Plaintiffs received identical modest salary increases which they claim were lower than the "average" for the faculty at the College of Dentistry (College). Their salary increases prior to filing their complaint were also below "average," but the amount varied among Plaintiffs. Plaintiffs contend this pattern of salary increases demonstrated retaliation for filing the discrimination charge, and for their complaints during the Fall of 1991 about what they perceived to be sex discrimination by the University and Regents. Their federal complaint asserted causes of action based on discrimination, retaliation, as well as violations of their rights to free speech, equal protection, and due process. The court bifurcated claims which were equitable in nature and not appropriate for submission to the jury. The jury gave an advisory finding on the issue of damages which were incurred prior to the effective date of the Civil Rights Act of 1991 Amendments, November 21, 1991.

The jury returned a verdict on April 27, 1995, against Plaintiffs on their claims for disparate treatment, but in their favor on the claims of retaliation. The jury awarded Plaintiffs compensatory damages for the retaliation violation.[1] The jury also found Defendants had violated Plaintiffs' First Amendment rights and awarded each plaintiff $1.00 in damages.

On May 5, 1995, this court rendered its Opinion and Judgment regarding Plaintiffs' equitable claims. Specifically, the court found Plaintiffs failed to establish any of their discrimination claims under either state or federal law. The court further found that Defendants' acts following the filing of the civil rights charges were retaliatory.

II. DEFENDANTS' POST-TRIAL MOTIONS

A. Motion for Judgment as Matter of Law

In reviewing a motion for judgment as a matter of law, it must be considered whether there is sufficient evidence to support the jury's verdict. *Smith v. World Ins. Co.*, 38 F.3d 1456, 1460 (8th Cir. 1994). The Court makes a determination by analyzing "the evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility. . . . [A]ll the evidence must point one way and be susceptible of no reasonable

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[1] Brine received $7,655 in lost wages and $65,000 in emotional distress damages; Pelton received $7,770 in lost wages and $65,000 in emotional distress damages; and Thompson received $4,211 in lost wages and $65,000 in emotional distress damages.

inference sustaining the position of the nonmoving party." *Id.* (quoting *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992)).

1. First Amendment

Defendants claim they are entitled to judgment as a matter of law on the issue of whether they violated Plaintiffs' free speech rights. Defendants contend Plaintiffs cannot recover on this theory first, because Defendants are not proper section 1983 defendants; second, the claim is barred by the Eleventh Amendment of the United States Constitution; and third, Plaintiffs have not precisely defined or set forth what speech they allege was protected.

As to Defendants' first argument, the respective language of the Civil Rights Act states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. It is well-established that a state or state agencies are not "persons" for purposes of the statute. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). As agencies of the state of Iowa, the University of Iowa and the Board of Regents as an entity cannot be sued in

federal court. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

Plaintiffs assert case law supports the proposition that all educational institutions are to be considered "persons" under the requirements of section 1983. However, this assertion is too broad, as demonstrated by the discussion of the Eleventh Amendment bar in *Van Pilsum v. Iowa State Univ. of Science and Technology*, 863 F. Supp. 935 (S.D. Ia. 1994). In *Van Pilsum*, Judge Vietor closely examined the nine factors which a court is directed to consider when evaluating an entity's status under the Eleventh Amendment.[2] It was the court's conclusion that the economic and administrative structure of the university system in Iowa as well as the rights and duties of the institutions demonstrated that the Regents and universities were not separate entities but instead, were part of the sovereign of the state of Iowa. *Van Pilsum*, 863 F. Supp. at 939.

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[2] Those factors are "(1) local law and decisions defining the status and nature of the agency involved in its relation to the sovereign; (2) most importantly, whether the payment of the judgment will have to be made out of the state treasury; (3) whether the agency has the funds or the power to satisfy the judgment; (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the agency's operations." *Van Pilsum*, 863 F. Supp. at 937, quoting *Sherman v. Curators of Univ. of Mo.*, 16 F.3d 860, 865 n.6 (8th Cir. 1994).

Cities, school districts, and other local government institutions, including some state educational institutions, may be properly named as section 1983 defendants. However, when the university is intertwined with the state to the extent that the institution cannot be distinguished from the state, neither the university nor its board of regents may be named as section 1983 defendants. *Cf. AASE v. South Dakota Bd. of Regents*, 400 N.W.2d 269 (S.D. 1987) (board not person within meaning of § 1983).

Based on the reasoning in *Van Pilsum*, the court holds that Plaintiffs' first amendment claims are barred by the immunity conferred by the Eleventh Amendment of the United States Constitution. Because of this, it is not necessary to address whether Plaintiffs have sufficiently proven their substantive cause of action.

Defendants' Motion for Judgment as a Matter of Law on this issue is granted.

2. Retaliation

Although Plaintiffs failed to prove their claims that the closing of the department was discriminatory, they did prevail on their retaliation claims. Defendants allege Plaintiffs' evidence was legally insufficient to establish either an "adverse employment action" or any causal connection between the employment action and the protected activity. Defendants further assert there is no evidence to support Plaintiffs' position that any damages arose prior to November 1991, nor is there any evidence to support the award of lost salary or emotional distress.

a. Protected Activity and Adverse Employment Action

The jury was instructed that in order to find retaliation, Plaintiffs had to show: 1) they were engaged in a protected activity; 2) they suffered an adverse employment action; and 3) there was a causal connection between the protected activity and the adverse employment action. *See* Jury Instruction No. 5; *see also Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548 (8th Cir. 1993). The parties agree this instruction accurately sets out the elements of a retaliation claim.

Plaintiffs strongly voiced their opposition to the department's closing as early as September 1991, immediately after learning that the program was being considered for termination. The evidence showed that Plaintiffs' opposition was based on educational as well as sex discrimination concerns. Opposition to discrimination is recognized as protected activity. 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice . . . to discriminate . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, . . . ").

An adverse employment action is not limited to discharge or demotion. For example, the Eighth Circuit Court of Appeals has found adverse employment actions where plaintiffs were transferred and subjected to poor working conditions. *Bradford v. Norfolk S. Corp.*, No. 94-2625 (8th Cir. May 18, 1995). Plaintiffs assert the University made a number of adverse decisions, including structuring the closing to result in the early demotion of Professor Brine from Department Executive Officer

(DEO), failing to include the department faculty in the planning for phase out activities, and Plaintiffs' receipt of identical salary increases which were lower than the "average" salary increase awarded in the College of Dentistry.

i. Demotion of Professor Brine

The Regent's decision to close the department was effective June 30, 1992, with allowance for existing students to complete their degrees. Although closing a program is not an adverse employment action, *Harlston v. McDonnell Douglas*, 3 F.3d 379, 382 (8th Cir. 1994), this action eliminated the necessity of Professor Brine to remain as the DEO. Plaintiffs argue that because there were three years left before the final class of students graduated, it was retaliatory and punitive to reduce her position to either Director or Program Coordinator. Even though Professor Brine no longer held DEO status, she continued to function as the head of the program. However, the Department's closure resulted in her reporting to the DEO of the Department of Preventative and Community Dentistry, Dr. Jed Hand, rather than reporting directly to the Dean of the College of Dentistry, James McLeran. Professor Brine was without authority to make decisions routinely made as department head (including ordering office supplies without Hand's approval), attend DEO meetings, or any direct input in the programs in the College of Dentistry. Finally, Plaintiffs argue the unnecessarily early dismantling of the Dental Hygiene Department resulted in the loss of resources, professional self-

esteem, research grants for themselves, as well as career opportunities for the department's students.

It was not an adverse employment decision to eliminate the duties of the DEO in light of the decision to eliminate the department. *Harlston,* 37 F.3d at 382 (reassignment without diminution of salary or benefits not adverse employment action). However, the timing of such a decision may be an adverse employment decision. Plaintiffs presented evidence that other programs that were also being eliminated at the University were allowed to maintain their department status and DEO positions until the last class of students had graduated. Further, although Professor Brine was assigned her regular responsibilities inherent in leading a department, she was not given the commensurate authority to carry out those responsibilities. From this evidence, a jury could have reasonably concluded that the decision to immediately dismantle the department structure, including Professor Brine's position as DEO, was retaliatory.

ii. Phase Out Activities

Plaintiffs' evidence demonstrated the exclusion from active participation in the Ad Hoc Committee and other review processes prevented them from, among other things, presenting data and information relevant to the closure issue, responding to concerns raised by committee members, correcting inaccurate committee minutes, and receiving information crucial to forming a response to the closure decision. A jury could have reasonably concluded that failure to directly include Plaintiffs in

these activities showed personal hostility related to their complaints of discrimination.

Plaintiffs' evidence also established that there was no follow-through from the University on the issue of assignment to new "academic homes," which will impact on their future advancement and job security. Although Plaintiffs have not taken the lead to resolve this issue, the manner and timing of the Defendants' limited efforts could have allowed a jury to reasonably conclude that these actions were retaliatory.

iii. Identical Salary Increases

After filing their charges of discrimination with the appropriate agencies, Plaintiffs received identical pay raises. Pay raises prior to this time varied among the three plaintiffs. Further, Plaintiffs presented evidence that their raises were lower than the "average" salary increase given within the College of Dentistry. Based on Plaintiffs' Exhibit 1693, the jury awarded Plaintiffs the difference between their actual salary increases and the "School Average Annual Percent Increase."

A failure to receive commensurate salary increases as those of similarly situated male faculty may constitute an adverse employment action. *See Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 479 (8th Cir. 1984) (female faculty members received lower salaries overall and received fewer market-factor and performance increases). However, there must be credible evidence of such disparity. In computing the "School Average Annual Percent Increase," the College of Dentistry includes increases

allocated from the General Education Fund (G.E.F.), earnings from the Dental Services Plan (D.S.P.), grants and contracts, and promotion increases. There was no evidence that Plaintiffs were eligible for any money from grants, contracts, or any significant amount of services performed under the D.S.P. Instead, they qualified only for raises under the G.E.F. or a promotion, if applicable. Nor did Plaintiffs present evidence that their work merited more than the standard G.E.F. increase which other salaried Dental College employees received. Plaintiffs compared their G.E.F. raises to others who received raises from the G.E.F. as well as other sources. When compared only to the G.E.F. raises received by others, Plaintiffs were at or above the level of other faculty members. Plaintiffs argue that had their Department been better staffed or supported by the administration over the previous decade, they would have been in a position to perform more D.S.P. or grant work, and thus, have been eligible for payments from these sources. However, there was no showing that this purported "lack of support" was at all related to lower raises due to *retaliation* for complaints about sex discrimination.

In their cross-examination, Defendants criticized Plaintiffs' comparison of their salary increases with increases received by all others in the College of Dentistry. However, the jury disregarded Defendants' explanation. Plaintiffs' evidence is not susceptible of any reasonable inference sustaining their position as they were not entitled to raises from any other source other than the G.E.F. To compare Plaintiffs' circumstance to others not similarly situated skews the correlation of salary increases. The jury could not have reasonably

relied on Plaintiffs' evidence to conclude that Plaintiffs' salary increases were lower than "average," as there was no credible evidence presented which accurately proved the "average" to which they compared themselves, or that there was an automatic entitlement to an "average" increase.

Plaintiffs' argument is twofold, however; that is, even if the salary increases were not lower than others similarly situated, Plaintiffs received a lack of individualized treatment which they claim was retaliatory-based. Standing alone, receiving identical increases is insufficient evidence to establish retaliation.

3. Damages Prior to November 1991

Defendants claim Plaintiffs may not recover damages prior to the effective date of the 1991 amendments to the Civil Rights Act, November 21, 1991. First, Defendants claim there was no evidence of either actual or compensatory damages prior to that date. Second, Defendants assert that the amendments were not retroactive, and thus, cannot be applied prior to that time.

The court first addresses the argument of lost wages. The jury's verdict included lost wages to Pauline Brine of $7,655; Elizabeth Pelton of $7,700; and Nancy Thompson of $4,211. As discussed above, the jury arrived at these figures using Plaintiffs' exhibits which compare the Plaintiffs' salary increases with the increases of others whose increase is attributable in part to sources unavailable to Plaintiffs. For the reasons stated above, this evidence is not susceptible of a reasonable inference sustaining Plaintiffs' position, and the award of lost wages is stricken.

Compensatory damages, however, are available to Plaintiffs. Plaintiffs showed evidence that they voiced their complaints of sex discrimination and opposition to the closing, and were not kept informed or allowed direct participation regarding certain decisions leading to the closing. It was reasonable for the jury to conclude that some measure of emotional distress damages arose prior to November 1991. Plaintiffs would not be able to recover compensatory damages prior to November 21, 1991, under Title VII. *Landgraf v. U.S.I. Film Prod.*, 114 S. Ct. 1483, 1508 (1994) (compensatory damages not retroactively applied to *conduct* occurring prior to effective date of Amendments). However, there is no retroactivity barrier under state law. Iowa Code Chapter 216 (1991). Plaintiffs are entitled to their full award of compensatory damages under Iowa law.

4. Actual Injury

Defendants also claim the compensatory award should be stricken because Plaintiffs did not suffer actual damages. Plaintiffs are still tenured faculty at the University of Iowa in the College of Dentistry, have not had their pay reduced, and continue to receive pay raises. Without these or any lost wages, Defendants argue Plaintiffs may not recover compensatory damages.

Under Iowa law, "a civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct." *Hy-Vee Food Stores, Inc. v. Iowa Civ. Rights Commn.*, 453 N.W.2d 512, 526 (Iowa 1990). Because Plaintiffs are entitled to compensatory damages under

Iowa law, it is not necessary to address whether they have suffered actual injury sufficient to recover compensable damages under 42 U.S.C. § 1981a. *See Farrar v. Hobby*, 113 S. Ct. 566 (1992) ("no compensatory damages may be awarded in a § 1983 suit absent proof of actual injury").

Emotional distress does not have to be severe to be compensable. *Id.* Professor Brine lost her status as Department Executive Officer, because of the structure of the phaseout the Plaintiffs' teaching responsibilities increased over the course of the closing, and they contend their marketability to other dental hygiene programs and research opportunities have been reduced. Further, the failure to assign Plaintiffs to permanent academic homes has diminished their job security and left future teaching assignments uncertain. Although Plaintiffs have not established that they suffered monetary damages, they are not without injury. The record supports an award of compensatory damages which reflects each Plaintiffs approximate one year salary. Although the award of approximately one year's salary per Plaintiff may seem high for the type of distress alleged, the court will not substitute its opinion for that of the jury.

Because Plaintiffs are entitled to compensatory damages under Iowa law, the court does not consider whether they are entitled to such damages under Title VII or Title IX. Further, because the Iowa Civil Rights Act was not affected by the amendments to the Civil Rights Act of 1991, the court need not distinguish between which part of the award was pre- and post-November 1991 damages. Under Iowa law, Plaintiffs are entitled to their full compensatory damage award.

B. Motion for New Trial

Defendants alternatively move for new trial because the verdict was against the weight of the evidence. " 'In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence – it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.' " *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992) (quoting *Ryan v. McDonough Power Equip.*, 734 F.2d 385, 387 (8th Cir. 1984)). Although it has great discretion, the district court is not free to set aside a jury verdict merely because it disagrees with the jury's verdict. *Id.* The "ultimate test was whether there had been a miscarriage of justice." *Id.* Thus, before a verdict can be set aside, "the district court must state its reasons for concluding that the verdict is against the great weight of the evidence." *Id.* at 781.

In support of its motion for new trial, Defendants reiterate most of the arguments made under their Motion for Judgment as a Matter of Law. Having granted Defendants' motion regarding the First Amendment issues, it is not necessary to consider the Motion for New Trial on those claims. Further, when considering Defendants' arguments on the other issues raised in the Motion for New Trial, the court finds the verdict is not against the great weight of evidence. Defendants' Motion for New Trial on those issues is denied.

One issue raised in Defendants' Motion for New Trial which was not included in its Motion for Judgment as a Matter of Law is the assertion that the court erred when

admitting into evidence a synopsis of the trial and decision of *Jew v. Univ. of Iowa*, 749 F. Supp. 946 (S.D. Ia. 1990). Ironically, Plaintiffs also assert there was prejudicial error from the court's failure to admit into evidence the judgment entered in *Jew*. The court considers these arguments jointly.

Dr. Jean Jew, M.D., was a member of the University of Iowa faculty in the College of Medicine. In 1986, Dr. Jew filed a gender discrimination suit against the University of Iowa and Board of Regents asserting both a Title VII claim for hostile work environment and a claim pursuant to Iowa's parallel antidiscrimination statute. *Jew*, 749 F. Supp. at 947, 956. Plaintiffs sought to introduce the entire *Jew* decision, including post-judgment motions and orders, into evidence by asserting it was crucial to the jury's consideration on the issue of intentional discrimination. Defendants argued the information should not be given to the jury in any form.

"Evidence of other employer actions is admissible when it supports an inference of discrimination." *Bradford v. Norfolk S. Corp.*, No. 94-2625 (8th Cir. May 18, 1995) (citing *Phillip v. ANR Freight Sys. Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991)). "The evidence, however, must assist in the development of a reasonable inference of discrimination within the context of each case's respective facts." *Id.*

Plaintiffs assert *Jew* was relevant to show a violation of the same law at the same campus with the same administration. However, the facts of *Jew* do not assist in the development of a reasonable inference of discrimination in this case. *Jew* was a nonjury case regarding disparate treatment only. Further, the discrimination occurred

within the College of Medicine as opposed to actions University-wide. The *Jew* decision was rendered two years before the closure decision and was totally unrelated to the incidents in this College or case. It does not relate to the history or work practices of Plaintiffs' employers, nor does it demonstrate Defendants' pattern or practice of discrimination against females at the University of Iowa. Because the decision in *Jew* does not support an inference of discrimination in this case, any reference to that case, even a limited reference, should have been excluded from the evidence.

Defendants' argument does not prevail either. The court submitted to the jury a one-page summary of the *Jew* case with a limiting instruction.[3] Apart from a brief reference to the *Jew* decision with a few witnesses, Plaintiffs never mentioned the decision the rest of the trial, including closing arguments.[4] by the jury's verdict, this

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[3] The jury was cautioned: "This information is admitted for the limited purpose of aiding the jury's assessment of whether the defendants' asserted reasons for actions taken are a pretext for intentional sex discrimination."

[4] Plaintiffs assert they were prevented from making reference to the *Jew* decision in their closing argument, including reference to the requirement that the Deans of the University read the decision within 45 days of Judge Vietor's decision. The synopsis of the *Jew* decision used states in part: " . . . the Court ordered distribution of the investigative report and the Court's opinion to and review of it within 45 days by the Board of Regents, the University of Iowa's President and Vice President, the *Deans of all Colleges* and the Department Heads of the College of Medicine and faculty/staff in the Department of Anatomy." From Synopsis read by the Court (emphasis added). Plaintiffs had sufficient opportunity to read and argue this information to the jury.

account of the *Jew* decision was not prejudicial to Defendants, and does not warrant a new trial.

III. PLAINTIFFS' MOTIONS

Plaintiffs have also filed post-trials motions, including a Motion for Judgment Notwithstanding the Verdict (JNOV)[5] or In the Alternative, New Trial, and Motion for Equitable Relief.

A. Motion for JNOV or New Trial

To determine whether judgment as a matter of law is appropriate, the court must consider whether there was sufficient evidence to support the jury's verdict. *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992). In making this determination, the "court must analyze the evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility. . . . [A]ll the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the nonmoving party." *Id.*

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[5] Under Fed. R. Civ. P. 50(a), motions for judgment as a matter of law now encompass all motions labeled as motions for judgment notwithstanding the verdict or motions for a directed verdict. See Commentary to Rule 50(a). The standard of review for a motion notwithstanding the verdict is interchangeable with the standard for a motion for judgment as a matter of law. *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1400 n.1 (8th Cir. 1994).

1. Disparate Treatment and Disparate Impact

Plaintiffs assert they were discriminated against based on sex, under theories of both disparate treatment and disparate impact. Their argument is an attempt to relitigate the issues already decided by the jury and by this court. Plaintiffs have failed to demonstrate that the evidence is susceptible of no reasonable inference sustaining these determinations.

2. Factual Inaccuracies in Order

Plaintiffs assert the court's Opinion and Judgment contains a number of inaccuracies and misstatements of fact. For example, Plaintiffs allege that the court inaccurately described the criteria applied by the Strategic Planning Steering Group and the timing of a public announcement; the court misunderstood the relationship of the Dental Hygiene Program with the general educational requirements; the court misrepresented the significance of the timing of the review process and the actual decision to close the department; and the court distorted Plaintiffs' presentation of information to the Ad Hoc Committee. Based on their perceived misunderstandings, Plaintiffs regard the entire Opinion and Judgment as tainted.

Most of the "inaccuracies" asserted by the Plaintiffs could be characterized as a difference in interpretation as opposed to a genuine misstatement of the record. As one example, Plaintiffs state the following:

> The Court continues stating that the ERC [External Review Committee] received information

> with regard to the Department from the Dental Hygiene Faculty and members of the public. *Although this is technically correct,* the amount of outside information that was considered by the ERC was extremely limited, and the majority of the information reviewed by the ERC was from the AHC [Ad Hoc Committee] hearings and reports. The correctness of the recordation of this information and its accuracy were questioned on several occasions.

Memorandum in Support of Plaintiffs' Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial at page 26 (emphasis added). These asserted errors appear to be reargument of the case rather than a request to the court to correct factual mistakes. Even if the record was inaccurately reflected in the Opinion and Judgment, Plaintiffs have failed to demonstrate that any of these errors would affect the ultimate decision of the court or jury.

3. Failure to Instruct on Disparate Impact

The 1991 Amendments to the Civil Rights Act exclude trial by jury where the discrimination claim is based on a disparate impact theory. 42 U.S.C. § 1981a(a)(1). However, Plaintiffs argue the jury should have been separately instructed on the issue under Iowa Code Chapter 216. Additionally, Plaintiffs reiterate their exception to the court not giving a separate instruction for their claim under Title IX of the Educational Amendments of 1972.

The Iowa Supreme Court has held that no right to a jury trial exists under the Iowa Civil Rights Act. *Smith v.*

ADM Feed Corp., 456 N.W.2d 378, 380 (Iowa 1990) (legislature did not intend for civil rights claimants to have statutory right to jury trial in district court under Chapter 601A [now Chapter 216]). Therefore, Plaintiffs' assertion that they were entitled to an instruction on disparate impact under Iowa law is not valid.

Case law does not directly address Plaintiffs' Title IX argument, however. The provisions of Title IX prohibit sex based discrimination in any educational program or activity receiving federal funding. 20 U.S.C. § 1681(a). This statute provides for a private right of action which is separate and distinct from a Title VII action or any other antidiscrimination claim. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979). However, circuits appear to be divided as to whether Title IX claims are governed by the same principles applicable to Title VII actions. *See Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 206 (4th Cir. 1994) (First, Eight, and Tenth Circuits holding Title VII provisions instructive for Title IX claims; Eleventh Circuit refusing to apply Title VII concepts to Title IX claim). Although not directly addressing the issue before this court, the Eighth Circuit has held that to the extent a plaintiff challenges conditions of employment as being discriminatory, the "Title IX claim merely duplicates her Title VII claim." *O'Connor v. Peru State College*, 781 F.2d 632, 642 n.8 (8th Cir. 1986). It is reasonable to find "that Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX." *Preston*, 31 F.3d at 207.

In holding that the Title IX claim here duplicated the Title VII claim, there was no reason to separately instruct

the jury on the Title IX claim. To do so would have only served to confuse the jury and create opportunity for an inconsistent verdict. Plaintiffs' motion for new trial on this issue is denied.

4. Failure to Instruct on Equal Protection and Due Process

For the reasons stated above, these named Defendants are not proper subjects for a suit arising under section 1983. Defendants were entitled to a directed verdict on this issue, and it was proper not to instruct the jury on the basis on equal protection and due process.

B. Request for Equitable and Compensatory Relief

Based on their awards, Plaintiffs seek equitable and compensatory relief.

1. Prejudgment Interest

Plaintiffs are requesting prejudgment interest from July 1, 1992, through May 5, 1995. Title VII provides for the payment of prejudgment interest from the date of the discriminatory action to the date of the judgment. *EEOC v. Rath Packing co.*, 787 F.2d 318, 333 (8th Cir. 1986). This recovery is limited, however, to claims against private employers. *Cross v. U.S. Postal Serv.*, 733 F.2d 1327, 1328 (8th Cir. 1984); see also *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815 (7th Cir. 1990) (noting prejudgment interest included as back pay remedy in suits against private employers). Defendants are not a private employer. As part of the

sovereign, Defendants are not required to pay prejudgment interest unless they give their consent.

Plaintiffs' request for prejudgment interest is denied.

2. Back Wages

Plaintiffs also seek back wages which would align their current salaries with what they believed to be appropriate wages. Plaintiffs assert they are entitled to receive the "average" school raise for the academic years 1992 through 1995. Although the jury used these figures to assign a figure of lost profits, the evidence does not support an award of back wages. Plaintiffs have failed to prove they are entitled to back wages, or any factual basis for such calculation. This motion is denied.

3. Increase Current Salary Level

Plaintiffs further assert that their current salary level should be increased to correspond to the raises they claim they should have received. Plaintiffs' current salaries have been based in part on the salary increases received in the past three years. There was no evidence presented that Plaintiffs' increases should be anything other than what was given them under the G.E.F. Likewise, there is no evidence that Plaintiffs' current salary level should be adjusted. This request is also denied.

4. Emotional Damages

The jury awarded each Plaintiff $65,000 for emotional damages. As stated in the Opinion and Judgment and in this order, *supra,* there was sufficient evidence for the jury

to grant this award. Plaintiffs shall each receive $65,000 in compensatory damages. *See EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 358 (8th Cir. 1994) (plaintiff only entitled to one compensatory damage award regardless of number of successful claims).

5. Nominal Damages

For the reasons discussed above, the section 1983 claims brought by the Plaintiffs are not cognizable against Defendants. The nominal damages awarded by the jury and court are stricken.

6. Postjudgment Interest

"Interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961. The Clerk of Court is responsible for determining the applicable Treasury Bill rate measured from the date of entry of judgment. By law, Plaintiffs are entitled to post-judgment interest.

7. Continuation of the Program

In their request for equitable relief, Plaintiffs seek the continuance of the Dental Hygiene Program as a separate and distinct department within the College of Dentistry, with Professor Brine as DEO; that all three Plaintiffs be promoted to the position of full professor with tenure; that the fifth faculty position be funded; to fund recruitment efforts; and provide financial aid in the form of

assistantships or tuition reductions for incoming students. Although the jury and this court found Defendants, through their agents, retaliated against Plaintiffs, there was no evidence that Defendants do not retain the capabilities to make rational and nondiscriminatory decisions in the future. The relief requested by Plaintiffs would require this court to usurp the responsibilities already delegated to the Regents and other administrative personnel in the College of Dentistry and College of Liberal Arts, or University. An order such as Plaintiffs' request is inappropriate in this situation. *C.f. Miller v. Lovell,* 14 F.3d 20, 21 (8th Cir. 1994) ("The Fourteenth Amendment's Due Process Clause does not convert the federal courts into arbitral forums for review of commonplace personnel decisions that public agencies routinely make.").

This court declines to order Plaintiffs' requested injunctive relief.[6]

In their supplemental memorandum, Plaintiffs request further relief from the court based on the "bad acts" of Defendants' counsel. Plaintiffs assert Defendants' counsel wrongfully disclosed Professor Pelton's medical information to individuals who were not privileged to examine this information. The circumstances relating to the disclosure were discussed; the court found that it had not been improperly disseminated, and that in any event, the material was now part of the unsealed trial record.

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[6] In the alternative, Plaintiffs requested that this matter be certified for interlocutory appeal. At oral argument, Plaintiffs withdrew their request.

Defendants' counsel assured the court they would provide written verification that all persons who received the information pre-trial had in fact returned any copies of the information, and that the information would not be further divulged. Plaintiffs state they have not received this written verification.

If Defendants' counsel have not yet provided the written assurances which they made on the record, they shall do so within ten days of the date of this order. Failure to do so may result in sanctions against Defendants' counsel.

Plaintiffs also request that a judgment similar to that imposed by Judge Vietor in *Jew*, requiring dissemination and publishing the opinion, be imposed on Defendants. The court does not find, however, that it is necessary to issue a *Jew*-like judgment in this case. *Jew* involved specific incidents of discrimination by her colleagues and supervisors which may have been prevented had the administrators responded more promptly to their requirements under the law. The conditions in *Jew* are not present here, and this type of judgment is inappropriate under these circumstances.

9. Attorney Fees

Under Title VII, Title IX, and Iowa Code Chapter 216, a court has the discretion to award attorney fees to the prevailing party as part of the costs assessed. 42 U.S.C. § 2000e-5(k); 42 U.S.C. § 1988(b); and Iowa Code § 216.16.(5). To be eligible for a fee award, a plaintiff must prevail on "any significant claim affording some of the relief sought." *Texas Ass'n. v. Garland*, 489 U.S. 782, 791

(1989) (rejecting requirement that plaintiff must prevail on "central issue" and achieve "primary relief sought"). The jury awarded Plaintiffs significant relief on their retaliation claim. This recovery entitles Plaintiffs to prevailing party status. Additionally, based on their recovery, the court is not inclined to reduce Plaintiffs' fees significantly, if at all, for lack of success. The court continues to look closely, however, at the documentation used to establish the lodestar in this case, and the nature and extent of expenses charged.

Plaintiffs have submitted their request for fees and costs, totalling $396,753.16[7], and Defendants have filed their objections. Rather than parsing through the fee bills, the court encourages the parties to reach a settlement in respect to attorneys' fees and costs. Plaintiffs shall notify the court no later than noon of July 3, 1995, if the parties cannot agree to an award of fees and costs. If no settlement is reached by that date, the court will promptly make the award and enter final judgment.

V. CONCLUSION

Based on the foregoing,

(1) Defendants' Motion for Judgment as a Matter of Law (Pleading #141) is granted as to Plaintiffs' First Amendment claims; granted as to the award of lost wages; denied as to the remaining grounds;

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[7] This figure reflects fees and costs requested in Plaintiffs' original fee request and their supplemental memorandum filed June 15, 1995.

(2) Defendants' Motion for New Trial (Pleading #141) is denied;

(3) Plaintiffs' Motion for JNOV or In The Alternative Motion for New Trial (Pleading #136) is denied;

(4) Plaintiffs' Motion for Equitable and Compensatory Relief (Pleading #138) is granted as to compensatory damages, and post-trial interest; requests for prejudgment interest, back wages, an increase of current salary level, nominal damages, and injunctive relief are denied; Defendants have ten days from the date of this order to file written assurance with the court that Plaintiff Pelton's medical records have been adequately secured as directed by this order;

(5) Plaintiffs' Request for Attorney Fees and Costs (Pleading #138) remains pending until Plaintiffs inform the court as to the status of settlement of their request. Once the status report is received, judgment will be entered on all post-trial motions.

IT IS SO ORDERED

Dated this 15th day of June, 1995.

/s/ Celeste F. Bremer
CELESTE F. BREMER
CHIEF U.S. MAGISTRATE JUDGE